No. 393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 68, AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. L., LOCAL NO. 3.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the picketing herein violated Sec. 8(b)(4)(A) of the National Labor Relations Act as amended.

2. Whether the acts done affected Interstate Commerce within the meaning of the act, and hence whether the Board had jurisdiction.

3. Whether the decision of the United States District Court for Colorado holding in injunction proceedings

brought by the Board that the matters involved were "purely local" and did not affect Interstate Commerce and hence the Board had no jurisdiction, did not render the question of jurisdiction *res judicata* in so far as further proceedings by the Board or the Courts were concerned.

SUMMARY OF ARGUMENT

I

Doose & Lintner, the general contractor, and Gould & Preisner, the non-union electrical sub had a common project for the work at the Bannock Street job: the general contractor to obtain, and the sub to furnish, cheap non-union electrical labor at 42½ cents an hour below union rates, on an otherwise all-union job. When at first approached by the Building Trades Council the general contractor pretended the job was all-union but later admitted that Gould & Preisner, a non-union shop carried on the Council's Unfair List for more than ten or fifteen years, "might do the job." The Council's representative answered that in that event the Council would have to inform their union workers by picketing the Bannock Street job; that union men would not work side by side with non-union men. The general contractor thereupon, in anticipation, moved the union men over to another of his jobs and picketing commenced at the Bannock Street job while the non-union men alone were working there. It continued for two weeks when the general contractor terminated its arrangement with the non-union sub on the ground that their men "were

unable to perform services" while the union men were at work.

Petitioner, Respondent and the Court below all have adopted the same test to ascertain whether the union's action was proscribed by Sec. 8(b)(4)(A), namely, was the action primary or secondary in character. If the latter the presence of a neutral is required. Respondents contend that under the above circumstances the general contractor was not a neutral; that it was at least in part responsible for conditions at the Bannock Street job; that its object was to obtain cheap non-union electrical work, which object it in part achieved by moving the union workers to other jobs and having the non-union electrical workers continue on the job for two weeks in spite of the picket. The picketing was against the general contractor and the sub inseparably; the job itself was unfair, as the placard stated. Congress cannot be deemed to have intended in Sec. 8(b)(4)(A) to prohibit this familiar pattern of union activity on the Board's theory that it was a secondary boycott. The union's activity had primary objectives both as to the general contractor and the sub. As the Court below held "The purpose of the Council was to render the particular job all union." The union did not strike to force the general contractor to cease doing business with the sub. The sub was eliminated when the general contractor realized it could not force union men to work with non-union men on the same job, an undoubted right of labor as long as it is free, and a right protected by Sec. 13 of the Act. The elimination of the sub was merely the incidental result of

the exercise of the traditional right of union workers to choose their work-mates.

Where the Building Trades are concerned, picketing to be effective must be on the job, while the job is in progress. This is conceded by the Board, but the Board claims the present picketing must be viewed askance because the placards did not isolate the sub as the object of the picketing. The Board's argument ignores the fact that the *job itself* was unfair, that there was a common program on the part of the general contractor and the sub: the one to obtain, the other to afford, cheap non-union labor on an otherwise all-union job. If under these circumstances labor cannot retaliate by a one-man picket carrying a placard "This job unfair", etc., its rights are indeed diminished by Sec. 8(b)(4)(A) and the right to strike under Sec. 13 is substantially impaired by the unnecessarily harsh rule contended for by the Board.

II

The Board had no jurisdiction as the labor activities herein did not "affect commerce." The District Court, in injunction proceedings, so held. In spite of this decision the Board persisted in taking jurisdiction. The project was a small local construction job. There was no proof at all that any of the materials used therein had an out-of-state origin. However, Gould and Preisner's total purchases of raw materials amounted to $86,560.30 of which $55,745.25, or 65 per cent were purchased outside the state. Gould and Preisner used $348.55 worth of materials on the job. The Board argued that 65 per cent thereof must have

come, theoretically, from outside the state. On this basis of inference, together with Gould & Preisner's annual inflow of out-of-state materials, the Board took jurisdiction.

With respect to the firm's annual inflow of out-of-state materials, the Board has held in various other cases that purchases of out-of-state materials in amounts exceeding $50,000 involve too low a figure for jurisdictional purposes. In fact the Board in its press release dated October 6, 1950 served notice that a direct inflow of out-of-state materials valued at $500,000 or more was required. The Board's policy, so announced, is more than a free expression of its preference. It constitutes an administrative construction of the Act to avoid its unwarranted application to purely local matters. In the present case the repercussion on interstate commerce seems clearly *de minimis*.

III

As indicated above the Board applied to the U. S. District Court for Colorado for injunctive relief under Section 10 (l) of the Act. The facts were fully developed but the Court held the activities were "purely local" and did not affect interstate commerce. It therefore dismissed the complaint and the Board abandoned its appeal. Respondents thereupon pleaded *res judicata* as to lack of interstate commerce.

The court below, one judge dissenting, rejected the defense on the ground that the scheme of the Act contemplated that the Board should have two remedies—one by interim injunctive relief, the other after final action by the

Board or the courts. Hence the majority below held that a decision in the injunction proceedings as to interstate commerce was not *res judicata* of this question before the Board.

The court below overlooks the fact that Congress intended the Board to have the two remedies *only in the event interstate commerce was involved.* Where a District Court has held it was not involved the question is *res judicata.* Congress intended the Act to be enforced not outside but inside the general law of the land and the latter includes the doctrine of *res judicata.* This court has held that jurisdictional rulings made on motions are just as final for the purposes of *res judicata* as any other court decisions.

I

The Picketing and Other Labor Action Herein Was Primary and Not Secondary

A. Doose & Lintner Were Not "Neutral":

The Board's argument at pp. 21-35 is bottomed upon its claim that Doose & Lintner, the general contractor, was a "neutral." This is not the fact. Doose & Lintner constructed the building by means of numerous sub-contractors. (R. 87). Mr. Lintner assured the Building Trades Council on January 8 that the Bannock Street project was an all union job. (R. 90). However, in the same conversation Mr. Lintner stated Gould & Preisner, a non-union shop which had resisted unionization for many years (R.

132), might do the electrical work. (R. 91, 229)[1]. The union representative replied that in that event he would have to notify the union men of this fact by picketing; that union, and non-union men could not work together on the same job. (R. 91-92). Doose & Lintner ignored the warning and the union men followed standard practice in this area and refused to work side by side with non-union men.[2] Doose & Lintner assigned the union men to other work from January 9 through January 22, 1948 (R. 230, 266, 273); during this time Gould & Preisner's non-union electricians worked on the job and were continually picketed. (R. 273). Around January 23, Doose & Lintner notified Gould & Preisner that their services were terminated "as your employees are unable to perform services while the employees of other sub-contractors are working on the premises." All-union labor was thereafter employed, the picketing ceased and the job was completed. (R. 273).

Doose & Lintner were obviously not "neutral" as the Government assumes in its brief (p. 21). It was a party to a labor dispute and indeed produced the dispute after fair warning. Doose & Lintner was not, in Senator Taft's words, "a third person who is wholly unconcerned in the disagreement." (Apr. 29, 1947, Congr. Rec. p. 4323, Vol. 93).

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[1] As a matter of fact Doose & Lintner had already, as far back as September 25, 1947, let out the electrical work to Gould & Preisner. (Findings of Fact, R. 227). The latter began preliminary work October 21, 1947, but did not commence extensive activities until January 8, 1948. (R. 227-228). During November and December the union warned Gould & Preisner that their electricians would be the only non-union men on the job and that under these circumstances the job could not progress. Gould & Preisner refused to do anything about the situation (R. 228); likewise Doose & Lintner did nothing.

[2] Union by-laws and regulations provide that no union men can work on a picketed job. (R. 230).

By flouting the union it stood to have the electrical work done 42½ cents an hour cheaper than if done by union electricians. (R. 169, 221). Doose & Lintner and the non-union electrical sub-contractor, Gould & Preisner, were not merely "allies" as held in *Douds* v. *Metropolitan Federation*, 75 F. Supp. 672, and *Mills* v. *United Assn.*, 83 F. Supp. 240; they were partners, for mutual self-interest, in anti-union activity. As the Court below held, "Doose & Lintner were not neutral. It brought Gould & Preisner with the non-union labor onto the job. This brought the Council and Doose & Lintner into direct controversy." (R. 279). Likewise, as the Court said, the picketing was aimed at conditions at the site for which Doose & Lintner was at least in part responsible. (R. 280).

Doose & Lintner, not being neutral, the present case presents none of the complications through which the Board attempts to steer a difficult path. (Brief p. 14-16). The Board's "criteria" (Brief p. 15) never came into play. There being no neutral there could be no secondary boycott; all union action was primary in character. We refer to the opinion below (R. 273-277) to demonstrate that Sec. 8(b)-(4)(A) insofar as here applicable was intended to outlaw secondary boycotts and not to prevent primary strike action, the right to which is guaranteed by Sec. 13 of the Act. The Board's Brief herein adopts the test of primary or secondary action.

B. The Picketing Had Valid Objectives Both as to Doose & Lintner and Gould & Preisner:

Doose & Lintner had four other sub-contractors, all unionized (R. 87) and gave the Building Trades' Council to

understand the entire job was union (R. 90, 227-8). Instead, the electrical work was let out at low non-union rates to Gould & Preisner, which had resisted unionization for ten or fifteen years (R. 132) and was on their "Unfair List" during all that time. (R. 220). Doose & Lintner knew the union rule against union men working side by side with non-union men (R. 91) but apparently was willing to take the chance in order to get the cheaper non-union electricians.

It seems incredible that Congress ever intended to prevent the Council picketing Doose & Lintner under these circumstances. The placard "This Job Unfair to Denver Building and Construction Trades Council" publicized Doose & Lintner's breach of faith and deceitful statement that the job was all union. It would be justified on this ground alone or on the ground of sheer resentment, or to teach Doose & Lintner a lesson in fair dealing. If these are not valid objectives under Free Speech, there are sound economic reasons. The Electrical Workers' union is a member of the Building Trades Council (R. 220). Is the Council compelled to watch cheap non-union electricians take the job away from members of its own Electrical Workers union? Does the law require its other union workers on the job—the bricklayers, the cement workers, the steel workers, the plumbers (R. 87)—to continue to work side by side with the non-union electricians? Or is it not a valid and traditional union activity to picket the job as unfair and thus serve notice not only to Doose & Lintner but on all other contractors that total unionization cannot

be circumvented by the device of having a non-union subcontractor[1].

As to Gould & Preisner, the Council had tried to unionize them for ten or fifteen years. (R. 132). The Council had never succeeded but Sec. 13 of the Act safeguards its right to make the attempt. Pickets with placards bearing the word "Unfair" have been traditional in organizational activity for over a century. If Gould & Preisner chose to become unionized the picketing would cease. Thus the picketing was designed to produce direct action from one of the parties picketed and hence was primary in character. It must be remembered the union did not picket either contractor, at its place of business; the pressure was on the *job;* if conditions on the job were cured the pressure would cease.

C. A Craft Union Must Picket the Job or Not Picket at All:

An industrial union can pick and choose the moment of pressure. However a craft union, going from job to job can only act effectively at the job and *during* the job. Until Gould & Preisner came on the job there would be no sense in picketing Doose & Lintner; the job was 100 per cent union. Later when Gould & Preisner came on the job there would be no sense in picketing Gould & Preisner at its home office, allowing it to continue non-union "business-as-usual" at Doose & Lintner's job. The only time and place for effective economic pressure was *at* the job, *while*

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[1] Had Doose & Lintner themselves brought the non union electricians on the job there would be a clear right to picket under Sec. 8(b)(4)(A). Does this section permit an easy subterfuge by the use of a sub-contractor?

the job was being done. Such picketing accomplished a dual purpose: (1) it brought home to Doose & Lintner that doublecrossing the Building Trades' Council by bringing in cheap non-union electrical workers was a risky business; (2) it awakened Gould & Preisner to the possibility: no union, no job. Both were valid union objectives.

The Board in its Brief p. 27-29 concedes the validity of the picketing in *United Electrical Workers, etc.* v. *Ryan Construction Co.*, 85 NLRB 418; where the union picketed Bucyrus (the primary employer). This resulted in Ryan's employees refusing to finish a construction job for Bucyrus. Apparently the fact that the placards were directed at Bucyrus, not Ryan, was a principal factor leading to the Board's approval (Brief p. 29). In the present case, however, the Board says, the placards state "This *job* unfair * * *." and hence the picketing is illegal. The argument is unrealistic because it ignores the fact that here the union's complaint was against both the general contractor and his sub-contractor, i.e., the union claimed the entire job was unfair. The fact that it was unfair for different reasons makes no difference: the placard obviously could not tell the entire story. Also, the job itself was objectionable to the union, no matter who was responsible. Even if we assume with the Board that Doose & Lintner were neutral, the differences between the present case and the *Ryan* case above are insignificant and the *Ryan* doctrine applies.

The Board in its Brief p. 30-35 admits the validity of on-the-job picketing provided it is restricted "to the times when the primary employer is doing business at the neu-

tral's premises[1] and is designed only to publicize the dispute with the primary employer." (R. 31). We submit such restrictions have no application to a case such as the present one where Doose & Lintner were certainly not neutral and where the union quarrel was with both interested employers. It may be noted that in anticipation of the picketing, Doose & Lintner on January 8 assigned their union workers to another job which proceeded without interruption and without complaint from the union. (R. 230). This negatives any pressure on Doose & Lintner *except at the job.* Also, during the entire two week period of picketing the only men at work on the Bannock Street job were Gould & Preisner's non-union electricians. (R. 231).

D. If the Object of the Picketing was Valid, Secondary Resultants Did Not Render It Invalid:

The Board in its Brief p. 43 admits that "an ultimate objective of the Council and its affiliates was to make the Bannock Street project wholly union." This was held by the Court below which continued "Accordingly the object was not in any literal sense to require Doose & Lintner to cease doing business with Gould & Preisner" (R. 277). The latter firm if it chose could unionize and bring the picketing to an immediate end. It did not choose to unionize, no doubt because of a profit motive; if it unionized it would have to pay union wages which would prevent it underbidding union contractors.

We think it fantastic to believe that Congress ever in-

[1] The Bannock Street job was not the "neutral's premises"—the two contractors were both working on a third party's premises, to which each had equal access.

tended Sec. 8(b)(4)(A) to prevent union men from refusing to work with non-union men. It must be remembered that the non-union electricians herein worked on the job for two weeks after the picketing started. (R. 231). During this time the general contractor used the union men on another job. What the employer wanted was to force the union men to work with the non-union men side by side. This the union men refused to do. After a two weeks' tug-of-war Doose & Lintner on January 22 saw the impossibility of forcing the union men to rejoin the non-union men then on the job and so terminated Gould & Preisner's services because the latter's employees "are unable to perform services while the employees of other sub-contractors are working on the premises." (R. 231). Doose & Lintner was not compelled to cease doing business with the non-union sub-contractor; it could have allowed the non-union men to continue to work, as they had for two weeks, in spite of the picket. What Doose & Lintner could not do was to force all parties, union and non-union, to work simultaneously on the project. Termination of the non-union services was a mere recognition by Doose & Lintner of the failure of their plans.

We do not impute to Congress any such grandiose plan as an attempt to prevent union labor from choosing its workmates. Yet construed as the Board contends, Sec. 8(b)(4)(A) will have this result in the construction industry. The right of union men to quit would be sustained only where the end-result was failure. Where as here the result was an all union job the work stoppage would be regarded, retrospectively, as a violation of Sec. 8(b)(4)(A).

This gives carte blanche to a general contractor to force into a predominantly union job as many non-union sub-contractors as he may desire. The union could then picket only with the aid of a corps of detectives, on the watch for different groups of non-union men as they come and go[1], followed by quick changes in the wording of the placard to single out the offending group[2]. The right to strike guaranteed by Sec. 13 would thus vanish as a result of Board rulings rendering its effective exercise impossible. We submit that the right to picket generally, using a placard "Unfair" should exist where the activities of the two employers are, as here, enmeshed, and when as held below (R. 280) the picketing and other action is aimed against both, inseparably. As the Court below said:

> "The job was said to be 'unfair.' The contractor cannot separate itself from the conditions there so as to make the action by the Council against it secondary; nor can the sub-contractor." (R. 280.)

E. It is Unrealistic to Argue that the General Contractor and the Sub-contractor Were Not Allies:

The Board argues in its Brief, p. 51-63, that the two contractors herein are not "allies" and that Doose & Lintner was entirely neutral. We have answered this argu-

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[1] This would be the result of what the Board in its Brief, p. 31-32, advocates on the basis of *International Brotherhood, etc. and Schultz Refrig. Service*, 87 NLRB 502 and *International Brotherhood and Sterling Beverages*, 90 NLRB No. 75.

[2] Following *Sailors' Union, etc. and Moore Dry Dock Co.*, 92 NLRB No. 93; *United Electrical, etc., Workers and Ryan Constr. Co.*, 85 NLRB 417; and *Oil Workers Int. and Pure Oil Co.*, 84 NLRB 315; See Board's Brief, pp. 37, 39.

ment in subdivision A of the present Point, p. 3. It is not necessary to the union to argue that Doose & Lintner and Gould & Preisner were allies; it is sufficient if it be shown that Doose & Lintner was not a neutral, for without a neutral there can be no secondary boycott. Certainly the two contractors had a common project: the general contractor to obtain, and the sub-contractor to furnish, cheap non-union electrical labor on an otherwise all union job. By definition this removes Doose & Lintner from the role of neutral and thus we reach an end of the matter.

II.

The Board Had No Jurisdiction as the Labor Activities Herein Did Not "Affect Commerce"

The court below did not disturb the Board's holding of jurisdiction though it said, "the decision in this regard is a close one." (R. 267.) We think the present is an extreme case and that the rule *de minimis* required its dismissal.

Proof of jurisdiction is limited to inferences as to value of out-of-state materials used by Gould & Preisner. Their total charge for their electrical work was to be $2,300 (R. 218). There was no proof of how much of this represented materials. From October 21, 1947 when they started (R. 227-8) up to the termination of their services after two weeks steady work in January, 1948, the total value of the materials used was $348.55 (R. 218). The Board in its Brief (p. 6, footnote 2) admits "the record does not disclose what percentage, if any, of these materials come from out-of-state sources."

Gould and Preisner's total out-of-state purchases for the year 1947 amounted to $55,745.25 (R. 216). No evidence was adduced that any of the material actually used, or to be used, in the Bannock Street job came from outside of the state (R. 267). It was simply assumed that as 65 per cent of all the company's purchases came from out of the state it followed that 65 per cent of these out-of-state purchases would be used on the Bannock Street job. Thus by inference based upon inference $226.56 of out-of-state materials would theoretically be used or usable on the Bannock Street job (R. 216, 267, 269, footnote 2).

The court below held that the interstate commerce relied on to show jurisdiction ended at Gould and Preisner's warehouse and hence this material was no longer in interstate commerce (R. 269, 216, 219).

Conceding that under *NLRB* v. *Fainblatt*, 306 U. S. 601, 607, no particular volume of commerce is required still there should be enough involved to take the case out of the rule of *de minimis*.

Since the decision in *Matter of Local 74, United Brotherhood of Carpenters, et al*, 80 NLRB No. 91 (the Watson Case), the Board has steadily restricted its cases to those involving substantial amounts where indirect effect on commerce is the source of jurisdiction. See *Petredis and Fryer*, 85 NLRB 241, (construction project of $80,000 too low); *Makins Sand and Gravel Co.*, 85 NLRB 213, ($72,000 of out-of-state materials too low); *Brewer and Brewer Sons, Inc.*, 85 NLRB 387 ($50,000 of out-of-state raw materials too low; $100,000 worth of trucks purchased within the

state but originating out of the state, too low); *Matter of Carpenter and Skaer* 90 NLRB 78 ($81,000 out-of-state purchases too low, total business $685,000 too low).

The Board in its release dated October 6, 1950 has stated that where it is the sole basis of jurisdiction a *direct* inflow of out-of-state materials valued at $500,000 or more is required. Where it is *indirect* an inflow valued at $1,000,000 or more a year is required.

The Board's policy is not its free expression of preference but, we submit, constitutes a construction of the Act. In effect to avoid stretching the coverage of the Act beyond reasonable objectives, the Board has undertaken to say that certain minimum figures must be present where interstate commerce is not directly involved. Yet, in spite of the above the Board continues to seek an enforcement order in the present case. The Board does so when if the case were presently pending before the Board it would, by its own present policy, be compelled to dismiss it.

The court below eked out jurisdiction not on the basis of the showing as to Bannock Street but by pointing to the Lo Sasso project, another controversy affecting Gould and Preisner, where the Board held no violation was involved. On this basis, the court below held the record showed a recurrent problem (R. 269). However, even such a recurring problem would not bring the present case within the Board's recent criteria.

We feel that this Court's solicitude for the reserved powers of the States shown in such cases as *Polish National Alliance* v. *NLRB*, 322 U. S. 643, requires serious consid-

eration of the present point. At least, we think the court should be fully advised of the extreme length to which the Board would commit this Court as to the extent of the commerce clause in the Act.

III.

The District Court's Decision Herein that Interstate Commerce Was Not Involved Was Res Judicata As to Jurisdiction

Prior to the proceedings before the Examiner the Board applied to the United States District Court for Colorado for injunctive relief under Sec. 10 (l) of the Act. The injunction suit was not tried out on affidavits; the Board produced witnesses who testified in open court and the facts were fully developed. (R. 215-216, 218, 257-258, 270-271.) The Court found the activities were "purely local" and did not affect interstate commerce and dismissed the complaint. (R. 215; *Sperry* v. *Denver Bldg. Trades, etc.*, 77 F. Supp. 321. Finding 4; Conclusions of Law 1 and 2, R. 209-210.) The Board took an appeal but later dismissed it. (R. 271.) Respondents thereupon pleaded *res judicata* before the Examiner, the Board and the Court below claiming that the Board was bound as to this crucial jurisdictional fact by the decision it had itself induced.

The Court below (one judge dissenting) rejected the defense on the basis of the scheme of the Act, which contemplated, it held, two remedies, one by interim injunctive relief, the other after final action by the Board or the Courts. (R. 271.) The Board in its Brief, p. 3, footnote,

takes the same position here; that the Court in the injunction proceedings is not called on to decide whether unfair labor practices affecting commerce were committed, but only whether there was reasonable cause to believe they had. The ultimate determination, the Board claims, is left to the Board in proceedings taken under Sec. 10 (b) and (c).

We think Congress intended the Board to have the two remedies *only in the event interstate commerce was involved.* Where the Board has sought a ruling and obtained a District Court decision that the affair is "purely local," that should be the end of the matter. Congress intended the Act to be enforced not outside, but inside, the general law of the land, and the latter includes the doctrine of *res judicata.* There is no showing that application of the doctrine would be inconsistent with the method devised by Congress, as held below. It is significant that the Court below held against the application of the doctrine on the ground of Congressional intent only and not, as it says "because of lack of any of the elements which usually make out a case for the application of *res judicata* (Opinion below, R. 272).

Jurisdictional rulings made on motions are just as final, for the purposes of *res judicata,* as any other Court decision. (*Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, 526-7; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 78; cf. *Chicago Rock Island, etc., R. Co.* v. *Schendel,* 270 U. S. 611.) The rule applies to a decision denying jurisdiction as well as to those sustaining it. (*Ripperger* v. *Allyn Co.,* 113 F. (2) 332, 333.) The vice of disregarding the District

Court's ruling is illustrated in the present case. After years of court proceedings, it turns out now that interstate commerce is only affected to the extent of 65 per cent of $348.55 worth of materials *supposed* to have been, but not proved to have been purchased outside the State, and supposed to have been, but not proved to have been used in the building. (R. 216-218; opinion of court below R. 269, footnote 2.) In fact, by present Board standards the case lacks exactly $444,254.75 of involving the requisite jurisdictional amount.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below was correct and should be affirmed.

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The Court below (one judge dissenting) rejected the defense on the basis of the scheme of the Act, which contemplated, it held, two remedies, one by interim injunctive relief, the other after final action by the Board or the Courts. (R. 271.) The Board in its Brief, p. 3, footnote,

takes the same position here; that the Court in the injunction proceedings is not called on to decide whether unfair labor practices affecting commerce were committed, but only whether there was reasonable cause to believe they had. The ultimate determination, the Board claims, is left to the Board in proceedings taken under Sec. 10 (b) and (c).

We think Congress intended the Board to have the two remedies *only in the event interstate commerce was involved.* Where the Board has sought a ruling and obtained a District Court decision that the affair is "purely local," that should be the end of the matter. Congress intended the Act to be enforced not outside, but inside, the general law of the land, and the latter includes the doctrine of *res judicata.* There is no showing that application of the doctrine would be inconsistent with the method devised by Congress, as held below. It is significant that the Court below held against the application of the doctrine on the ground of Congressional intent only and not, as it says "because of lack of any of the elements which usually make out a case for the application of *res judicata* (Opinion below, R. 272).

Jurisdictional rulings made on motions are just as final, for the purposes of *res judicata,* as any other Court decision. (*Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, 526-7; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 78; cf. *Chicago Rock Island, etc., R. Co.* v. *Schendel,* 270 U. S. 611.) The rule applies to a decision denying jurisdiction as well as to those sustaining it. (*Ripperger* v. *Allyn Co.,* 113 F. (2) 332, 333.) The vice of disregarding the District

Court's ruling is illustrated in the present case. After years of court proceedings, it turns out now that interstate commerce is only affected to the extent of 65 per cent of $348.55 worth of materials *supposed* to have been, but not proved to have been purchased outside the State, and supposed to have been, but not proved to have been used in the building. (R. 216-218; opinion of court below R. 269, footnote 2.) In fact, by present Board standards the case lacks exactly $444,254.75 of involving the requisite jurisdictional amount.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below was correct and should be affirmed.

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